

FILED BY CLERK

AUG -8 2011

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2011-0137-PR
	)	DEPARTMENT B
Respondent,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 111, Rules of
ABRAAN RENE ORTIZ,	)	the Supreme Court
	)	
Petitioner.	)	
_____	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20064581

Honorable Teresa Godoy, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney  
By Jacob R. Lines

Tucson  
Attorneys for Respondent

Abraan Rene Ortiz

Tucson  
In Propria Persona

V Á S Q U E Z, Presiding Judge.

¶1 Petitioner Abraan Ortiz seeks review of the trial court's order denying relief in his successive post-conviction relief proceeding, initiated pursuant to Rule 32, Ariz. R. Crim. P. "We will not disturb a trial court's ruling on a petition for post-conviction relief

absent a clear abuse of discretion.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Ortiz has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, Ortiz was convicted of possession of a narcotic drug for sale and possession of drug paraphernalia. The trial court imposed concurrent, enhanced, presumptive prison terms of 3.75 and 15.75 years. This court affirmed his convictions and sentences on appeal. *State v. Ortiz*, No. 2 CA-CR 2007-0375 (memorandum decision filed Dec. 10, 2008). Ortiz thereafter initiated Rule 32 proceedings, the trial court summarily dismissed his petitions,<sup>1</sup> and this court denied relief on review. *State v. Ortiz*, No. 2 CA-CR 2010-0246-PR (memorandum decision filed Dec. 9, 2010).

¶3 Ortiz then filed a “Motion for Praecipe and to Reinstate Rule 32 Proceedings” and an “[a]mended” petition for post-conviction relief in which he asserted “claim(s) of ineffectiveness [of counsel] at every critical stage.” The trial court concluded good cause had not been shown to allow an amendment to Ortiz’s original petition after his first Rule 32 proceeding had been “adjudicated and . . . denied on its merits.” *See* Ariz. R. Crim. P. 32.6(d). But it treated Ortiz’s filings as a second post-conviction proceeding and denied relief, concluding Ortiz’s claims were precluded and not based on newly discovered evidence under Rule 32.1(e).

¶4 Ortiz filed a petition for special action in this court challenging the trial court’s rulings. We dismissed the petition for special action, ruling instead that we would

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<sup>1</sup>Ortiz’s appointed counsel filed a petition on his behalf, and the trial court also allowed Ortiz to file a separate pro se petition in the same proceeding.

treat it “as a petition for review of the denial of post-conviction relief.” As he did below, Ortiz again raises claims of ineffective assistance of trial, appellate, and Rule 32 counsel.

¶5 We agree with the trial court that Ortiz’s claims of ineffective assistance of trial and appellate counsel are precluded. Those claims could have been raised in Ortiz’s first Rule 32 proceeding, and indeed some claims of ineffective assistance were raised and adjudicated. The claims are therefore precluded, either because they were waived by his failure to raise them in the first Rule 32 proceeding or were finally adjudicated in that proceeding. *See* Ariz. R. Crim. P. 32.2(a)(2),(3).

¶6 Ortiz also alleges counsel in his first Rule 32 proceeding provided ineffective assistance. “But, the non-pleading defendant has ‘no constitutional right to counsel or effective assistance in post-conviction proceedings’; although the non-pleading defendant has the right to effective representation on appeal, he has no ‘valid, substantive claim under Rule 32’ for ‘ineffective assistance on a prior [post-conviction relief] petition.’” *Osterkamp v. Browning*, 226 Ariz. 485, ¶ 18, 250 P.3d 551, 556 (App. 2011), *quoting* *State v. Krum*, 183 Ariz. 288, 292 & n.5, 903 P.2d 596, 600 & n.5 (1995). The trial court therefore correctly denied relief on that claim as well. *Cf. State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984) (appellate court will affirm trial court’s ruling if result legally correct for any reason).

¶7 And, although Ortiz refers to newly discovered evidence, apparently arguing thereby that his claims are not subject to preclusion, *see* Ariz. R. Crim. P. 32.1(e) and 32.2(b), he has not explained what evidence is purportedly newly discovered, how any such evidence meets the requirements of Rule 32.1(e), or why he failed to raise this

claim in his previous Rule 32 proceeding as required by Rule 32.2(b). Thus we agree with the trial court that Ortiz is not entitled to relief on the ground of newly discovered evidence.

¶8 In a “[m]otion to admonish court of exhaustion of all state remedies,” filed in this court, Ortiz also apparently asserts, separate from his claims of ineffective assistance of counsel, that the trial court improperly denied him a final probation revocation hearing, considered his lack of remorse as an aggravating factor at sentencing, and violated Rules 9.3 and 17, Ariz. R. Crim. P. To the extent any of these claims were presented to the court below, *see State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980), they are precluded because they could have been raised on appeal, *see* Ariz. R. Crim. P. 32.2(a)(3). Therefore, although we grant the petition for review, we deny relief.

/s/ *Garye L. Vásquez*

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GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ *Philip G. Espinosa*

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PHILIP G. ESPINOSA, Judge

/s/ *Joseph W. Howard*

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JOSEPH W. HOWARD, Chief Judge